



DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 152

CMS-9995-IFC2

RIN 0938-AQ70

Pre-Existing Condition Insurance Plan Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Amendment to interim final rule with request for comments.

SUMMARY: This document contains an amendment regarding program eligibility to the interim final regulation implementing the Pre-Existing Condition Plan program under provisions of the Patient Protection and Affordable Care Act. *In light of a new process recently announced by the Department of Homeland Security, eligibility for the program is being amended so that the program does not inadvertently expand the scope of that process.*

DATES: Effective date. These interim final regulations are effective on **[INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]**.

Comment date. Comments are due on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN FEDERAL REGISTER]**.

Applicability date. This amendment to the interim final regulation generally applies to individuals on **[INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]**.

ADDRESSES: Written comments may be submitted to any of the addresses specified below. Please do not submit duplicates.

All comments will be made available to the public. **WARNING:** Do not include any personally identifiable information (such as name, address, or other contact information) or

confidential business information that you do not want publicly disclosed. All comments are posted on the Internet exactly as received, and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

In commenting, please refer to file code CMS-9995-IFC2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments in one of four ways (please choose only one of the ways listed):

1. Electronically. You may submit electronic comments on this regulation to **<http://www.regulations.gov>**. Follow the "Submit a comment" instructions.
2. By regular mail. You may mail written comments to the following address ONLY:
Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9995-IFC2,
P.O. Box 8016,
Baltimore, MD 21244-8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. By express or overnight mail. You may send written comments to the following address ONLY:
Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9995-IFC2,
Mail Stop C4-26-05,

7500 Security Boulevard,
Baltimore, MD 21244-1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

4. By hand or courier. Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC--

Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Room 445-G, Hubert H. Humphrey Building,
200 Independence Avenue, SW.,
Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD--

Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
7500 Security Boulevard,
Baltimore, MD 21244-1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786-4492 in advance to schedule your arrival with one of our staff members.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: <http://www.regulations.gov>. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. EST. To schedule an appointment to view public comments, phone 1-800-743-3951.

FOR FURTHER INFORMATION CONTACT: Alexis Ahlstrom, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (202) 690-7506.

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act, Pub. L. 111-148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act of 2010 (Reconciliation Act), Pub. L. 111-152, was enacted on March 30, 2010 (collectively, “Affordable Care Act”). Section 1201 of the Affordable Care Act prohibits issuers of non-grandfathered health insurance coverage from denying coverage or inflating rates based on health status or medical history in policy years beginning on or after January 1, 2014. In light of the fact that these protections will not take

effect until 2014, section 1101 of the Affordable Care Act directs the Secretary of Health and Human Services to establish, either directly or through contracts with states or nonprofit private entities, a temporary high risk health insurance pool program to provide immediate access to coverage for eligible uninsured Americans with pre-existing conditions. (Hereafter, we generally refer to this program as the Pre-Existing Condition Insurance Plan program, or the PCIP program.) The PCIP program provides coverage to eligible uninsured Americans with pre-existing conditions until 2014, when the protections under section 1201 of the Affordable Care Act referenced above take effect and coverage is available through the Affordable Insurance Exchanges established under section 1311 or 1321 of the Act.

HHS previously issued an interim final regulation implementing section 1101 of the Affordable Care Act. This interim final rule was published in the **Federal Register** on July 30, 2010 (75 FR 45014). For the reasons explained below, HHS is now issuing an amendment to this interim final rule.

II. Overview of the Amendment to the Interim Final Rule

The interim final rule issued on July 30, 2010, provided information on the administration of the PCIP program, eligibility for and enrollment in the program, program benefits, program oversight, program funding, coordination with state laws and programs, and the transition to coverage through the Affordable Insurance Exchanges. Under section 1101(d) of the Affordable Care Act and codified by the July 30, 2010 interim final rule at 45 CFR 152.14(a) (1) through (3), an individual is eligible to enroll in a PCIP if he or she: (1) is a citizen or national of the United States or is lawfully present in the United States (as determined in

accordance with section 1411 of the Affordable Care Act¹); (2) has not been covered under creditable coverage (as defined in section 2701(c)(1) of the Public Health Service Act as of the date of enactment of the Affordable Care Act--that is, March 23, 2010) during the 6-month period prior to the date on which he or she is applying for coverage through the PCIP; and (3) has a pre-existing condition, as determined in a manner consistent with guidance issued by the Secretary of HHS. We further provided in § 152.14(a)(4) of the interim final rule that an individual must be a resident of a state that falls within the service area of the PCIP.

In the interim final rule, HHS defined “lawfully present” as having a similar meaning as that given to “lawfully residing” in Medicaid and the Children’s Health Insurance Program (CHIP), as set forth in a State Health Official letter issued by the Centers for Medicare & Medicaid Services (CMS) on July 1, 2010.² The July 30, 2010 interim final rule codified that definition of “lawfully present” at § 152.2.

Subsequent regulations implementing the Affordable Insurance Exchanges, 45 CFR 155.20 (77 FR 18310, March 27, 2012), and the premium tax credits, 26 CFR 1.36B-1(g) (77 FR 30377, May 23, 2012), issued by HHS and the Department of the Treasury respectively, define “lawfully present” by a cross-reference to the definition in § 152.2.

On June 15, 2012, the Department of Homeland Security (DHS) announced that it will consider providing temporary relief from removal by exercising deferred action on a case-by-case basis with respect to certain individuals under age 31 who meet DHS’s guidelines, including that he or she came to the United States as children and does not present a risk to national

¹ Section 1411 of the Affordable Care Act describes the procedures to be employed for determining eligibility for coverage through the Affordable Insurance Exchanges, and for the premium tax credits and cost-sharing reductions that will help eligible individuals afford such coverage.

² See State Health Official (SHO) Letter #10-006/CHIPRA #17 at: <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO10006.pdf>.

security or public safety.³ This process is referred to by DHS as Deferred Action for Childhood Arrivals (DACA).⁴

As DHS has explained, the DACA process is designed to ensure that governmental resources for the removal of individuals are focused on high priority cases, including those involving a danger to national security or a risk to public safety, and not on low priority cases.⁵ Because the reasons that DHS offered for adopting the DACA process do not pertain to eligibility for Medicaid or CHIP, HHS has determined that these benefits should not be extended as a result of DHS deferring action under DACA. Concurrent with this amendment, CMS is issuing a State Health Official letter providing that individuals whose cases are deferred under DHS's DACA process will not be eligible under the state option.⁶ As it also would not be consistent with the reasons offered for adopting the DACA process to extend health insurance subsidies under the Affordable Care Act to these individuals, HHS is amending its definition of "lawfully present" in the PCIP program, so that the PCIP program interim final rule does not inadvertently expand the scope of the DACA process.

Under the amended rule, individuals with deferred action under the DACA process are not eligible to enroll in the PCIP program. As the PCIP program definition of "lawfully present" is incorporated into the rules governing the Affordable Insurance Exchanges and the premium tax credits, individuals whose cases are deferred under the DACA process also will not be eligible to enroll in coverage through the Affordable Insurance Exchanges and, therefore, will not receive coverage that could make them eligible for premium tax credits under Treasury

³ June 15, 2012 Memorandum of Secretary of Homeland Security Janet Napolitano, at: <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁴ Consideration of Deferred Action for Childhood Arrivals, at: <http://www.uscis.gov/childhoodarrivals>.

⁵ See *supra* nn. 4-5.

⁶ <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SHO-12-002.pdf>.

regulations (see 26 CFR 1.36-2(a)(1)) or for cost-sharing reductions starting in 2014.⁷ This is consistent with the rationale above.

We invite comment on the determination to exclude these individuals from eligibility for the PCIP program and from eligibility for coverage through the Affordable Insurance Exchanges, with the consequences noted above with respect to the premium tax credits and the cost-sharing reductions.

III. Interim Final Regulation and Waiver of Delay of Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 551, *et seq.*), while a notice of proposed rulemaking and an opportunity for public comment is generally required before promulgation of regulations, this is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest.

HHS has determined that issuing this regulation in proposed form, such that it would not become effective until after public comment, would be contrary to the public interest. Because the PCIP program – a temporary program with limited funding – is currently enrolling eligible individuals and providing benefits for such enrollees, it is important that we provide clarity with respect to eligibility for this new and unforeseen group of individuals as soon as possible, before anyone with deferred action under the DACA process applies to enroll in the PCIP program.

⁷ This is consistent with prior guidance issued by DHS: “If my case is deferred, will I be eligible for premium tax credits and reduced cost sharing through Affordable Insurance Exchanges starting in 2014? No. The Departments of Health and Human Services and the Treasury intend to conform the relevant regulations to the extent necessary to exempt individuals with deferred action for childhood arrivals from eligibility for premium tax credits and reduced cost sharing. This is consistent with the policy under S. 3992, the Development, Relief, and Education for Alien Minors (DREAM) Act of 2010.” See Consideration of Deferred Action for Childhood Arrivals, <http://www.uscis.gov/childhoodarrivals>.

HHS is issuing this amendment as an interim final rule with comment so as to provide the public with an opportunity for comment on the amendment, including to gather public comment on the implications of the amendment.

The APA also generally requires that a final rule be effective no sooner than 30 days after the date of publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds good cause as to why the effective date should not be delayed, and the agency incorporates a statement of the finding and its reason in the rule issued.

For the same reason that we are issuing an interim final rule, we are making it effective immediately; that is, because the PCIP program – a temporary program with limited funding – is currently enrolling eligible individuals and providing benefits for such enrollees, it is important that we provide clarity with respect to the eligibility of this new and unforeseen group of individuals as soon as possible, before anyone with deferred action under the DACA process applies to enroll in the PCIP program.

IV. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

V. Statutory Authority

The amendment to the interim final regulation is adopted pursuant to the authority contained in section 1101 of the Patient Protection and Affordable Care Act (Pub. L. 111-148).

List of Subjects in 45 CFR Part 152

Administrative practice and procedure, Health care, Health insurance, Penalties,
Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Department of Health and Human Services amends 45 CFR part 152 as follows:

PART 152—PRE-EXISTING CONDITION INSURANCE PLAN PROGRAM

1. The authority citation for part 152 continues to read as follows:

Authority: Sec. 1101 of the Patient Protection and Affordable Care Act (Pub. L. 111-148).

2. Section 152.2 is amended by adding paragraph (8) to the definition of “lawfully present” to read as follows:

§ 152.2 Definitions.

* * * * *

Lawfully present means--- * * *

* * * * *

(8) Exception. An individual with deferred action under the Department of Homeland Security’s deferred action for childhood arrivals process, as described in the Secretary of Homeland Security’s June 15, 2012, memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (7) of this definition.

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Dated: _August 24, 2012_____

Marilyn Tavenner,
Acting Administrator,
Centers for Medicare & Medicaid Services.

Approved: _August 27, 2012_____

Kathleen Sebelius,
Secretary,
Department of Health and Human Services.

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